No. ~~301.~~ 6

In the Supreme Court of the United States

October Term, 1952.

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, OVER-THE-ROAD AND CITY TRANSFER DRIVERS, HELPERS, DOCKMEN AND WAREHOUSEMEN, LOCAL UNION NO. 41, A. F. L., *Respondent*.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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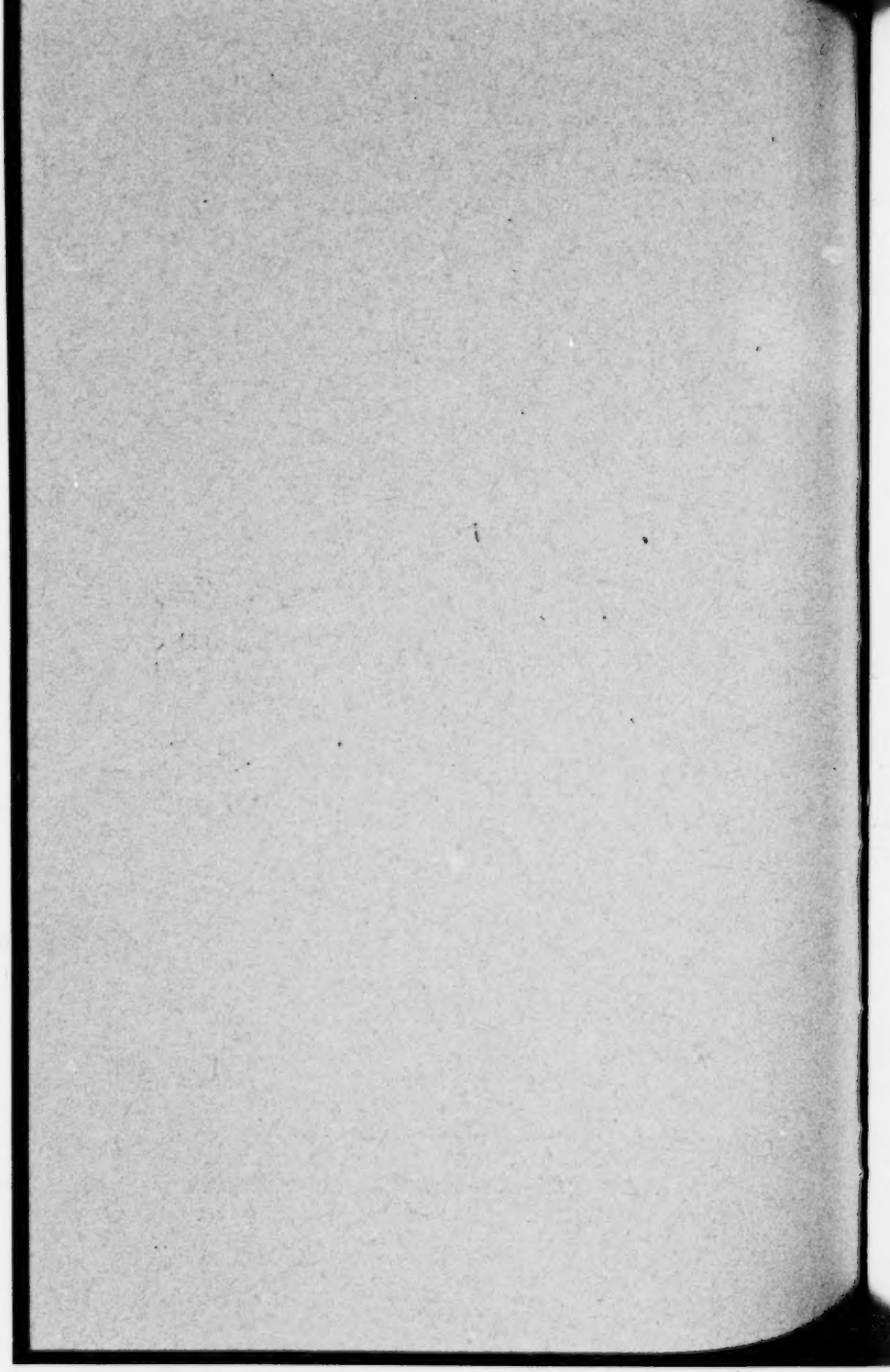

INDEX.

Cases Cited.

Statutes Cited.

Miscellaneous.

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No. 301.

PRELIMINARY STATEMENT.

The issue here concerns the decision of the United States Court of Appeals for the Eighth Circuit entered April 29, 1952 (196 F. 2d 1), that there was "no evidence in the record either substantial or in the nature of a scintilla to support" the finding of the National Labor Relations Board (94 NLRB 1494) of discrimination which would, or did, "encourage or discourage membership in any labor organization" in violation of Section 8(a)(3) of the National Labor Relations Act.

The court below, in its opinion, found that respondent caused an employer to discriminate against one of its employees and held that "discrimination alone is not sufficient," but that such discrimination must also result in encouragement or discouragement of membership in a labor organization.

QUESTION PRESENTED.

The actual question presented by the record is:

Must the record, as a whole, before the United States Court of Appeals contain substantial evidence to support a conclusion that discrimination in regard to the tenure or condition of employment of an employee did, or would, encourage or discourage membership in any labor organization?

ADDITIONAL STATEMENT OF THE CASE.

In addition to the pertinent facts summarized by the petitioner in its petition for a writ of certiorari, the respondent submits these additional facts:

The charging party, Frank Boston, a member of the respondent, testified that he did not at any time intend to refrain from or evade the obligations of his membership; that he had desired to withdraw the charge filed by him and process the matter through the procedures of the respondent and abide by the majority decision of his fellow members (R.A. 22-24).[1]

The agreement between respondent and Byers Transportation Company provided that at the end of thirty days' employment employees automatically received seniority standing. Such agreement did not make membership in respondent a qualification for seniority listing. The record is barren of any evidence of an illegal union shop enforcement (R.A. 33).

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[1]For purposes of this petition, the printed record before this Court consists of two separately paginated volumes: the volume containing the pleadings and the Board's decision and order as presented to the court below, herein are designated "(R....)," and the appendix to respondent's brief, in the court below, are designated herein "(R.A....)."

REASONS FOR DENYING THE WRIT.

The decision of the court below is not in conflict with the decision of the Court of Appeals for the Second Circuit in *National Labor Relations Board* v. *The Radio Officers Union, etc.*, 196 F. 2d 960, as petitioner states is the basis for a writ of certiorari. The factual situation in the Radio Officers case, supra, was entirely different and distinct from that in the case now before this Court.

In the Radio Officers case, the court, speaking of the actions and conduct of the union and the employer, said (l. c. 965):

> "Such conduct displayed to all non-members the union's power and the strong measures it was prepared to take to protect union members."

In the instant case there was no conduct which "displayed to all non-members the union's power." Instead, to the contrary, as we shall hereinafter show, the actions of the respondent and the employer involved, so far as effect on either members or non-members, could only reflect against the union's interests.

There was no basis for the petitioner's finding that the employer discriminated against Boston in violation of Section 8(a)(3) of the National Labor Relations Act. The record in this case is absolutely barren of any evidence at all that the employer's actions in this case encouraged or discouraged membership in a labor organization within the meaning of Section 8(a)(3). As the Court in *NLRB* v. *Reliable Newspaper Delivery, Inc.*, 187 F. 2d 547 (C. A. 3), said:

> "Even if we should assume that the disparity brought about by the retroactive payments amounted

to discrimination, then, under the statutory language, *we must go further and ascertain whether that discrimination encouraged membership*[2] in the Newspaper and Mail Deliverers' Union of New York and Vicinity. And we do not find substantial evidence of that encouragement. * * *."

"* * * While our decision in *Quaker State Oil Refining Corp.* v. *National Labor Relations Board,* 119 F. 2d 631 (4 Labor Cases, para. 60,435), had to do with alleged 8(3) violations which arose out of the actions of employees, the underlying thought of that case is quite material here. We there said at page 633: 'It is quite clear that all of these conversations took place casually in the course of conversations between the individuals concerned. *There is no evidence that they had the slightest effect in actually preventing or discouraging membership in the Union.*' See also *National Labor Relations Board* v. *Public Service Co-Ordinated Transport,* 3 Cir., 177 F. 2d 119 (17 Labor Cases, para. 65,322).

"Generally speaking, the proposition that *in order to establish an 8(a)(3) violation there must be evidence that the employer's act encouraged or discouraged union membership has widespread support.* In *National Labor Relations Board* v. *Air Associates, Inc.,* 2 Cir., 121 F. 2d 586 (4 Labor Cases, para. 60,587, 60,716), the court held at page 592: 'Section 8(3) requires that the discrimination in regard to tenure of employment have *both* the *purpose* and *effect* of discouraging union membership.' The later decision in that same circuit, *National Labor Relations Board* v. *Cities Service Oil Co.,* 129 F. 2d 933, 937 (6 Labor Cases, para. 61,147), in no way restricted that language. In *Stonewall Cotton Mills, Inc.,* v. *National Labor Relations Board,* 5 Cir., 129 F. 2d 629 (5 Labor Cases, para. 61,099), the Board had found certain lay-offs and discharges to have been in violation of Section 8(3). The court said at page 632: 'To make out a case under it, it must

[2]Throughout this brief, emphasis is ours unless otherwise noted.

appear that an employer has by discrimination in regard to hire, etc., encouraged or discouraged membership in any labor organization.' This conclusion was not disturbed by the motion for rehearing (129 F. 2d 633) which was disposed of entirely upon evidential grounds. To the same effect see *Western Cartridge Co.* v. *National Labor Relations Board*, 7 Cir., 139 F. 2d 855, 859 (7 Labor Cases, para. 61,095, 61,967); *National Labor Relations Board* v. *Reynolds International Pen Co.*, 7 Cir., 162 F. 2d 680, 690 (13 Labor Cases, para. 63,872); *Wells, Inc.*, v. *National Labor Relations Board*, 9 Cir., 162 F. 2d 457, 459, 460 (12 Labor Cases, para. 63,848); *National Labor Relations Board* v. *Robbins Tire and Rubber Co., Inc.*, 5 Cir., 161 F. 2d 798, 801 (12 Labor Cases, para. 633,776).

"As above indicated, we find no substantial evidence in the record to justify the Board's holding that respondent had violated Section 8(a)(3) of the Act. * * *."

A finding that respondent violated Section 8(b)(2) must be preceded by a finding that the employer's actions were violative of Section 8(a)(3). The court below found that the record of this case contains sufficient evidence of respondent having caused the employer to treat Boston's seniority as reduced because of the application of Section 45 of respondent's by-laws. However, respondent contends that this reduction would not result in an unfair labor practice within the meaning of the National Labor Relations Act, because it was not motivated by a desire to encourage or discourage Boston's union membership or non-membership, but rather because of a non-discriminatory by-law of respondent and the non-discriminatory application of that by-law under the collective bargaining agreement. This is not discrimination within the meaning of the Act. The term "discrimination" as

used in Section 8(a)(3) and in the law of labor relations "refers to inequality of treatment based upon the desire of employers to discourage free employee organization for collective bargaining purposes."[3]

Under Section 8(a)(3) employers may not discriminate in regard to hire or tenure of employment or any term or condition of employment if such action is motivated by a desire to encourage or discourage membership in a labor organization. Employers are not prohibited, however, from *any* discrimination if they are not motivated by a desire to inhibit free organization. In order to hold that a violation of that section has occurred, a preponderance of the evidence must establish that the discrimination was motivated by anti-union considerations. Failing this burden of proof, the Board may not hold that a violation of Section 8(a)(3) has occurred. The employer is free to discourage or otherwise discipline his employees for a good cause, a bad cause or no cause at all, so long as he is not primarily motivated by anti-union considerations and so long as encouragement or discouragement of union membership or activity will not be a direct and foreseeable consequence of the employer's conduct. This Court in upholding the constitutionality of Section 8(a)(3) stated:[4]

> "The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, *the Board is not entitled to make its authority a pretext for interference* with the right of discharge when that

[3]Volume II, Labor Law Reporter, C. C. H., Para. 4,001.

[4]*NLRB* v. *Laughlin Steel Corp.*, 301 U. S. 1, 57 S. Ct. 615; *Associated Press* v. *NLRB*, 301 U. S. 103, 57 S. Ct. 650; *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, 59 S. Ct. 490.

> right is exercised for *other reasons*, than such intimidation and coercion. The true purpose is the subject of investigation with full opportunity to show the facts." *NLRB* v. *Laughlin Steel Corp., supra.*

and that:

> "We think that the true purpose of Congress is reasonably clear. Congress was intent upon the protection of the right of employees to self-organization and to the selection of representatives of their own choosing for collective bargaining without restraint or coercion. * * * To assure that protection, the employer is not permitted to discharge his employees because of union activity or agitation for collective bargaining." *NLRB* v. *Fansteel M. Corp., supra.*

Citing this Court's decision in *NLRB* v. *Fansteel M. Corp., supra*, the Court of Appeals, 9th Circuit, in *NLRB* v. *Potlatch Forests*, 189 F. 2d 82, 85, said:

> "Failure of an employer to maintain previous seniority rights for returning strikers may be said to discourage union membership, but many acts of an employer which seem to come within the language of Section 8(a)(3) are nevertheless permissible if they are done for a legitimate business purpose."

and found that:

> "Potlatch has exhibited no anti-union prejudice and in making the selection has provided that all of the individuals in the returning group retain full seniority rights as between themselves.
>
> "There has been no discrimination between union and non-union employees on the basis of union membership."

The identical situation is present here in that Byers Transportation Company, as between the union members group of employees, has allowed them to make their own determinations of seniority and did not discriminate between its union and nonunion members.

In *NLRB* v. *Winona Textile Mills*, 160 F. 2d 201, the court, in refusing to sustain a Board determination of discrimination against spinning room employees on account of union activities, said:

> "We recognize the broad discretion vested by Congress in the Board to require the reimbursement of workers for loss of wages discriminatorily imposed, and will interfere with exercise of that discretion only for the most cogent reasons. (Citing relevant decisions.) But we have the right *and duty* to reject a conclusion of the Board which disregards or fails to give proper cognizance to uncontradicted or well-established facts. (Citation.) The sanctions of the National Labor Relations Act are imposed for the protection of employees and not in punishment of their employer. *NLRB* v. *Virginia Electric & Power Co.*, 314 U. S. 469, 479, 62 S. Ct. 344."

The court then held that the evidence sustained the finding that the reason for discontinuance of overtime at employer's mill was the employer's determination to indicate to employees the economic sanctions that could be imposed against them, and that the National Labor Relations Board properly considered the discontinuance of overtime in determining whether employer had interfered with or coerced employees in the exercise of their statutory right, but that where both union and nonunion employees were treated alike there was no discrimination against individual union workers and the board was with-

ut power to require reimbursement of union workers by he employer.

Again, in *Western Cartridge Co.* v. *NLRB*, 139 F. 2d 55, the Seventh Circuit Court of Appeals said:

> "Without violating Section 8(3) of the Act, the company had a right to discharge these (striking) employees or to refuse to take them back into its employ as long as it did not discriminate against them in such a manner as *to encourage or discourage membership in any labor organization.* (Court emphasis.) * * * Under Section 8(3) of the Act to constitute the unfair labor practice of discrimination, the discrimination with regard to hire and tenure must have *the purpose* 'to encourage or discourage membership in any labor organization.'
>
> "The Board has found discrimination because of concerted activities. We think there is evidence to support such findings. We must go one step further. Was that discrimination to encourage or discourage membership in any labor organization? * * * Without bothering to point out any evidence to support a finding that such discrimination *was for the purpose of encouraging or discouraging membership in any labor organization* (court emphasis), the Board finds such discrimination 'thereby discouraged membership in the Union, etc.'
>
> "We are unable to find in the record any sustantial evidence to support a finding that the Company's acts toward its striking employees in the matter of their hire and tenure were taken to discourage membership in a labor organization. * * *
>
> "We recognize the exclusive right of the Board to draw inferences but there must be some evidence from which the inference can be drawn."

Disposing of an additional, separate, individual finding of Section 8(3) violation, the court also said:

> "This finding shows only that the Company discharged Goessman for a reason that did not exist in fact. Does it therefore follow as a reasonable inference that Goessman was discharged in order to discourage his membership in a labor organization? * * * We think there is not substantial evidence to support the Board's finding as to Goessman."

The employer, Byers Transportation Company, Inc., was not guilty of discrimination prescribed by Section 8(a)(3) since it did not intend to encourage or discourage membership in a labor organization and such encouragement or discouragement does not logically or impliedly flow from the employer's action. Congress did not intend the phrase "encourage or discourage membership in any labor organization" found in Section 8(a)(3) to encompass a factual situation such as this. Clearly the existence of the respondent's by-law and the employer's assistance in enforcing it would *tend to restrain* applications for membership in respondent. Certainly, it cannot be argued that such was the type of "discouragement" that Congress had reference to in drafting Section 8(a)(3). This discouragement of membership arises from the fact that the by-law of respondent applies *only to members* of that labor organization. Therefore, employees *who are not members* are not affected by the by-law although covered by the seniority clause in the collective bargaining agreement. The record discloses that there is no valid union shop agreement in existence and there is nothing in the record to indicate that respondent and the employer illegally conducted an unlawful union shop arrangement.[5]

[5]Respondent admitted the allegations of paragraph 7 of the complaint (R.A. 3).

Therefore, *it not being incumbent* upon an employee to become a member, it logically follows that it would be to his benefit to refrain from membership and thus *avoid the possibility* of reduction in seniority by application of the by-law. Thus Section 45 of respondent's by-laws does not "encourage" membership. If anything, it should tend to discourage such membership when it is obvious that such membership carries with it a *rather drastic penalty* for failure to keep current in dues payments.

The fact that Boston remained a member after the by-law was *put into effect* several years ago has no particular evidentiary value here since, so far as this record indicates, he may have had many reasons for valuing his membership in respondent and remained a member in spite of, and not because of, Section 45 of the by-laws.

In this case, the employee's reduction in seniority simply *resulted from his agreement*[6] *with the union* to abide by its rules. The respondent, while Boston was a member, acting as his bargaining agent and with his full acquiescence, acted for him with his employer with respect to his seniority rights and the matters which would affect such seniority rights. Boston, at the time the agreement was negotiated, could have withdrawn from membership in respondent *without affecting his tenure of employment*. He elected not to do so and the employer only did what Boston, through *his* bargaining agent, requested that it do; that is, to treat Boston's seniority as reduced in line with the employer's agreement with Boston's agent and to regard failure to pay current dues as a "controversy" over seniority standing, which would be referred to the union for settlement. There is nothing in the record which indicates that the employer evidenced

[6]The constitution and by-laws of labor organizations are regarded as contracts between such organizations and their members. *DeMille* v. *Amer. Fed. of Radio Artists*, 333 U. S. 876, 68 S. Ct. 906.

any feeling one way or the other with respect to the maintenance of Boston's membership in respondent. Thus the reduction in seniority cannot be said to have been motivated by desire to *encourage or discourage* membership in respondent.

Petitioner appears to have erred by failing to distinguish between assistance to respondent and encouraging membership in respondent as those terms are meant where found in the Act. If there was a rival union in the picture, there might be some basis for a charge that the employer in this case had contributed "financial or other support" to respondent in violation of Section 8(a)(2) by aiding in the collection of dues from members. That is not the charge here, nor would such a charge affect this respondent, since a violation of 8(b)(2) cannot be based upon a finding of a violation of Section 8(a)(2) but instead must be preceded, as heretofore pointed out, by a finding of 8(a)(3) violation.

In dissenting, Board Member Abe Murdock said:

> "On these facts I fail to perceive any restraint, coercion, or discrimination within the meaning of the sections of the Act which the majority finds have been violated. In what respect was Boston or any other employee of the Employer restrained, coerced, or discriminated against? The theory of the majority perforce must be that the Employer's action to effectuate the Union's by-law constitutes discrimination violative of Section 8(a)(3) because calculated to 'encourage' membership in and adherence to the rules of the Union. Common sense, however, tells us that the employer's action would not encourage membership in the Union.* As there is no union-security clause compelling membership in the Union, it would be quite apparent to Boston that if he resigned from the Union he could suffer no detriment in his em-

*Cf. American Pipe & Steel Corp., 93 NLRB No. 11."

ployment but on the contrary would be better off because he would no longer be subject to the Union's by-laws and subject to reduction in seniority if he fell behind in his dues payments. Contrary to the statement in the majority opinion, I do not overlook the fact that the seniority clause in the contract applies not only to union members but to all employees. But the majority's conclusion from that fact that Boston could not have escaped the reduction in seniority he suffered because of his delinquency by resigning from the union is a *non sequitur*. Their theory apparently is that the seniority clause is somehow discriminatory and would permit the union to apply its by-law and ask a reduction in seniority for nonmember employees who did not pay dues. But it is clear that the union's by-law is applicable only to members and there is not even a suggestion in the case that the union has sought to compel nonmembers to pay union dues or to penalize them for not paying. • • •

The majority of the Board did not assert its reasons[7] for finding a violation of Section 8(a)(3), but contented themselves with the statement that:

"We agree with the Trial Examiner that the employer, by reducing Boston's seniority for being delinquent in the payment of his union dues, discriminated against Boston and that such discrimination would constitute a violation of Section 8(a)(3) of the Act, where, as in this case, the respondent had not obtained a union shop contract or a certification pursuant to Section 9(e) of the Act. • • • In the American Pipe & Steel Corp. case,[8] the Board pointed

[7]The court in *Western Cartridge Co.* v. *NLRB, supra*, called the Board to account for that same failure saying: "Without *bothering* to point out any evidence to support a finding that such discrimination *was for the purpose of encouraging or discouraging membership in any labor organization* (court emphasis), the Board finds such discrimination 'thereby discouraged membership in the union, etc.'"

[8]American Pipe & Steel Corp., 93 NLRB No. 11."

> out that an employer may not lend his assistance to a union in compelling adherence to the latter's rules for in so doing *an employer would be strengthening the position of such union* contrary to the well-established principle that an employer's acceptance of the determination of a labor organization as to who shall be permitted to work for it is violative of Section 8(a)(3) where no lawful *contractual obligation for such action* exists.

Member Murdock in his dissent distinguishes the facts in the American Pipe & Steel Corp. case from those in the instant case.

The Board did not enlarge upon its statement that "in so doing an employer would be strengthening the position of such union" and in the case at hand it appears clear that, on the contrary, the employer by accepting the union's application of its by-laws would be working a detriment to respondent.

A realistic appraisal of the findings in the present record show simply that a union rule was applied to a willing union member so as to bring about a reduction of his seniority as he had agreed with the union should be done if he became in arrears of his dues. The statute (as to encouragement) applies only to conduct inducing nonmembers to become members of the union, or inducing members to remain members. The matter here is simply one of the internal affairs of a union and no statutory violation has been established.

As stated above, Section 8(a)(3) of the National Labor Relations Act is violated only if there is a discrimination from which an encouragement of union membership naturally and proximately follows. The petitioner is attempting to broaden the scope of the section so as to make it encompass a far greater meaning than Congress

ever intended. The idea that any assistance or cooperation by an employer in the application of a union's rule to employees who are members of the union and who do not intend to refrain from such membership and its concomitant benefits and liabilities is an enlargement of the plain wording of Section 8(a)(3) of the Act.

Conclusion.

For the reasons above stated, we respectfully submit the application for the writ of certiorari should be denied.

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